

Adopted	Rejected
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COMMITTEE REPORT

YES:	10
NO:	0

MR. SPEAKER:

Your Committee on Financial Institutions, to which was referred House Bill 1763, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill **be amended** as follows:

- 1 Delete everything after the enacting clause and insert the following:
- 2 SECTION 1. IC 32-28-12.5 IS ADDED TO THE INDIANA CODE
- 3 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
- 4 JULY 1, 2005]:
- 5 **Chapter 12.5. Commercial Real Estate Broker Liens**
- 6 **Sec. 1. This chapter may be cited as the "Commercial Real**
- 7 **Estate Broker Lien Act".**
- 8 **Sec. 2. As used in this chapter, "commercial real estate" means**
- 9 **any real estate other than:**
- 10 **(1) real estate containing one (1) to four (4) residential units;**
- 11 **(2) real estate on which no buildings or structures are located**
- 12 **and that is zoned for single family residential use; or**
- 13 **(3) single family residential units such as:**
- 14 **(A) condominiums;**
- 15 **(B) townhouses; or**

(C) homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even if those units are part of a larger building or parcel or real estate containing more than four (4) residential units.

Sec. 3. As used in this chapter, "fees or commissions" means compensation owed to a principal broker for performing services requiring a license under IC 25-34.1-3-2.

Sec. 4. As used in this chapter, "principal broker" has the meaning set forth in IC 25-34.1-1-2.

Sec. 5. As used in this chapter, "real estate" has the meaning set forth in IC 25-34.1-1-2.

Sec. 6. A principal broker may have a lien upon commercial real estate, or any interest in commercial real estate, that is the subject of a purchase, lease, or other conveyance to a buyer or tenant, in the amount that the principal broker is due for licensed services, including without limitation brokerage fees, consulting fees, and management fees due the principal broker under a written agreement, a contract, or another written instrument:

(1) signed by:

(A) the owner of an interest in the commercial real estate or by the owner's authorized agent; or

(B) a prospective buyer or prospective tenant, or by the buyer's or tenant's authorized agent; and

(2) entered into after June 30, 2005.

A lien under this chapter is available to the principal broker named in the agreement, contract, or other written instrument signed by the owner, buyer, or tenant, or their respective agents, and not to an employee or independent contractor of the principal broker.

Sec. 7. (a) A lien under this chapter attaches to commercial real estate or an interest in commercial real estate upon:

(1) the principal broker being entitled to fees or commissions under a written agreement, a contract, or another instrument signed by the owner, buyer, or tenant of the commercial real estate, or by an authorized agent of the owner, buyer, or tenant; and

(2) except as provided in sections 8 and 9 of this chapter, the principal broker recording a notice of lien in the office of the recorder of the county in which the commercial real estate or

an interest in the commercial real estate is located:

(A) before the recording of the deed for the actual conveyance or transfer of the commercial real estate against which the broker is claiming a lien, if the principal broker claims fees or commissions from the party conveying or transferring an interest in the commercial real estate; or

(B) not later than ninety (90) days after the recording of the deed or other instrument for the purchase or other conveyance or transfer of the commercial real estate, if the principal broker claims fees or commissions from the party receiving a conveyance or transfer of an interest in the commercial real estate.

(b) A lien under this chapter attaches as of the date of the recording of the notice of the lien under subsection (a)(2) and does not relate back to the date of the written agreement, contract, or other written instrument described in subsection (a)(1).

Sec. 8. (a) This section applies to a transaction involving the conveyance or transfer of commercial real estate in which:

(1) payment to a principal broker is due in installments; and
(2) a part of the installment payments is due only after the conveyance or transfer of the commercial real estate involved in the transaction.

(b) Subject to subsection (c), the principal broker may record a notice of lien for those payments described in subsection (a)(2) at any time after the transfer or conveyance, but not later than ninety (90) days after the date on which the payment is due. A notice of lien under this section is effective as a lien against the transferor's interest in the commercial real estate only to the extent consideration is still owed to the transferor by the transferee. However, the lien is effective against the transferee's interest in the commercial real estate without the limitation described in this subsection.

(c) A single claim for a lien recorded:

(1) before the transfer or conveyance of the commercial real estate; and

(2) with respect to all payments due in installments;

is valid and enforceable with respect to payments due after the

transfer or conveyance. However, as payments or partial payments of fees or commissions are received by the principal broker, the principal broker shall, by providing partial releases with respect to those payments, reduce the amount due the principal broker under the notice of lien described in this subsection.

Sec. 9. (a) Subject to subsection (b), in the case of a lease of commercial real estate, including a sublease or an assignment of a lease, the notice of a lien under this chapter must be recorded not later than ninety (90) days after the tenant takes possession of the leased premises. However, if:

(1) the transferor personally serves, on the principal broker entitled to claim a lien, written notice of the intended execution of the lease; and

(2) the notice described in subdivision (1) is served not later than ten (10) days before the date of the intended execution of the lease;

the principal broker's notice of lien must be recorded before the date indicated in the notice described in subdivision (1) for the execution of the lease. The lien attaches as of the recording of the notice of lien and does not relate back to the date of the written agreement, contract, or written instrument under which the principal broker is entitled to fees or commissions.

(b) As used in this subsection, "future fees or commissions" refers to fees or commissions:

(1) other than those fees or commissions due to a principal broker upon the execution of a lease under subsection (a); and

(2) due to the principal broker upon the exercise of an option to:

(A) expand the leased premises;

(B) renew or extend a lease; or

(C) purchase the commercial real estate;

under a written agreement, a contract, or another written instrument signed by the owner or tenant of the commercial real estate. The principal broker may record a notice of lien at any time after execution of the lease or other written agreement, contract, or written instrument that contains rights to future fees or commissions, but in no case later than ninety (90) days after the occurrence of a condition for which future fees or commissions are

1 claimed. Except as provided in section 13(b) of this chapter, an
 2 action to foreclose a lien to collect future fees or commissions must
 3 be commenced not later than two (2) years after the recording of
 4 the notice of the lien.

5 (c) If:

6 (1) commercial real estate is sold or otherwise conveyed before
 7 the date on which future fees or commissions are due; and

8 (2) the principal broker has recorded a valid notice of lien
 9 before the sale or other conveyance of the commercial real
 10 estate;

11 the purchaser or transferee is considered to have notice of and
 12 takes title to the commercial real estate subject to the notice of lien.
 13 However, if a principal broker claiming future fees or commissions
 14 fails to record a notice of lien for the future fees or commissions
 15 before the recording of a deed conveying legal title to the
 16 commercial real estate to the purchaser or transferee, the principal
 17 broker may not claim a lien on the commercial real estate. This
 18 subsection does not limit or otherwise affect claims or defenses a
 19 principal broker or owner or any other party may have in law or
 20 equity.

21 Sec. 10. A principal broker shall, not later than ten (10) days
 22 after recording a notice of lien under this chapter, personally serve
 23 or mail, by registered or certified mail, a copy of the notice of lien
 24 to the owner of record of the commercial real estate, or to the agent
 25 of the owner of record, at the address of the owner stated in the
 26 written agreement, contract, or other written instrument on which
 27 the claim for the lien is based. If the address of the owner or the
 28 owner's agent is not stated, the principal broker shall personally
 29 serve or mail, by registered or certified mail, a copy of the notice of
 30 the lien to the address where real estate taxes are sent for the
 31 commercial real estate on which the claim of lien is based. Mailing
 32 of the copy of the notice of lien is effective when deposited in the
 33 United States mail with postage prepaid. Personal service of the
 34 notice of the lien is effective upon receipt by the owner or the agent
 35 of the owner of record. A principal broker's lien is unenforceable
 36 if mailing or service of the copy of notice of lien does not occur at
 37 the time and in the manner required by this section.

38 Sec. 11. (a) A principal broker may bring suit to enforce a lien

under this chapter in the circuit or superior court in the county where the commercial real estate is located by filing a complaint and sworn affidavit that a notice of lien has been recorded as required by this chapter. The principal broker claiming the lien shall, not later than two (2) years after recording the notice of the lien, commence proceedings under this section by filing a complaint. A principal broker's failure to commence proceedings within the time prescribed by this subsection extinguishes the lien and a subsequent notice of lien may not be given for the same claim, nor may that claim be asserted in any other proceedings under this chapter.

(b) A principal broker claiming a lien based upon an option or other right to purchase or lease commercial real estate shall, not later than two (2) years after recording the notice of the lien, commence proceedings by filing a complaint. A principal broker's failure to commence proceedings within the time prescribed by this subsection extinguishes the lien and a subsequent notice of lien may not be given for the same claim, nor may that claim be asserted in any other proceedings under this chapter.

(c) A complaint under this section must contain:

- (1) a brief statement of the agreement, contract, or other written instrument that is the basis for the lien;
- (2) the date when the agreement, contract, or other written instrument was made;
- (3) a description of the services performed by the principal broker;
- (4) the amount due and unpaid for the services described in subdivision (3);
- (5) a description of the commercial real estate subject to the notice of lien; and
- (6) other facts reasonably necessary to describe the rights of the parties.

(d) The principal broker shall make all interested parties, of whose interest the principal broker is notified or has knowledge, defendants to the action and shall issue summons and provide service as in other civil actions. If a defendant:

- (1) has left Indiana;
- (2) on inquiry cannot be found; or

(3) is concealed within Indiana;
 so that process cannot be served on the defendant, the principal broker shall cause a notice to be given to the defendant, or cause a copy of the complaint to be served upon the defendant, in the manner and upon the same conditions as in other civil actions. Failure of the principal broker to provide proper summons or notice is grounds for judgment against the principal broker, with prejudice, and in favor of the defendant who is not properly served with proper summons or notice. All liens claimed under this chapter shall be foreclosed as provided for in IC 32-30-10.

Sec. 12. A notice of lien recorded under this chapter must state:

- (1) the name of the claimant;
- (2) the name of the owner of the commercial real estate upon which the lien is claimed;
- (3) a legal description of the commercial real estate upon which the lien is claimed;
- (4) the amount for which the lien is claimed; and
- (5) the license number of the principal broker's license under IC 25-34.1.

The notice of lien must contain a statement that the information contained in the notice is true and accurate to the knowledge of the signator. The notice of lien must be signed by the principal broker or by a person authorized to sign on behalf of the principal broker and must be verified.

Sec. 13. (a) If:

- (1) a notice of lien has been recorded with the office of the recorder of the appropriate county; and
- (2) a condition occurs that would preclude the principal broker from receiving fees or commissions under the terms of the written agreement, contract, or other written instrument upon which the lien is based;

the principal broker shall provide to the owner of record of the commercial real estate, not later than ten (10) days after written demand by the owner of record, a written release or satisfaction of the notice of lien.

(b) Upon written demand:

- (1) served by the owner, buyer, or tenant described in section 6 of this chapter, or the authorized agent of the owner, buyer,

or tenant described in section 6 of this chapter, on the principal broker claiming a lien under this chapter; and

(2) requiring the principal broker to:

(A) bring a suit to enforce the lien; or

(B) file an answer in a pending suit;

the principal broker shall bring a suit or file an answer not later than thirty (30) days after service of the demand. If the principal broker does not bring a suit or file an answer within the time prescribed by this subsection, the lien is extinguished. The service of a written demand under this subsection may be made by registered or certified mail, return receipt requested, or by personal service.

(c) If:

(1) a notice of lien under this chapter has been filed with the office of the recorder and the fees or commissions upon which the lien is based have been paid to the principal broker claiming the lien; or

(2) the principal broker fails to institute a suit to enforce the lien within the time prescribed by this chapter;

the principal broker shall, not later than five (5) days after receipt of a written demand from the owner, buyer, or tenant described in section 6 of this chapter for a release or an acknowledgment of satisfaction of the lien, acknowledge satisfaction or release of the lien in writing.

Sec. 14. If the principal broker and the party from whom fees or commissions are claimed under this chapter agree to alternative dispute resolution, any claim under this chapter must be heard and resolved in the forum agreed to by the parties. The court before which a lien foreclosure proceeding is brought under this chapter retains jurisdiction to enter judgment on the award or other result made or reached under alternative dispute resolution proceedings with respect to all parties to the foreclosure. The principal broker's notice of lien remains of record and the foreclosure proceeding shall be stayed during the pendency of the alternative dispute resolution proceedings.

Sec. 15. The cost of proceedings brought under this chapter, including reasonable attorney's fees, costs, and prejudgment interest due to the prevailing party shall be borne by the

1 nonprevailing party. If more than one (1) party is responsible for
 2 costs, fees, and prejudgment interest, the costs, fees, and
 3 prejudgment interest shall be equitably apportioned by the court
 4 or alternative dispute resolution tribunal among the responsible
 5 parties.

6 Sec. 16. Except for a waiver or release of a lien provided in
 7 consideration of payment of the fees or commissions claimed by a
 8 principal broker under this chapter, or except as otherwise
 9 provided in section 13 of this chapter, any waiver of a principal
 10 broker's right to a lien on commercial property under this chapter
 11 is void.

12 Sec. 17. Valid recorded liens, mortgages, and other
 13 encumbrances that are recorded before a principal broker's notice
 14 of lien under this chapter have priority over a principal broker's
 15 lien under this chapter. Prior recorded liens, mortgages, and
 16 encumbrances that have priority under this section include without
 17 limitation:

18 (1) a valid mechanic's lien that is recorded after a principal
 19 broker's notice of lien under this chapter, but that relates
 20 back to a date before the recording date of the principal
 21 broker's notice of lien; and

22 (2) prior recorded liens securing revolving credit and future
 23 advances of construction loans.

24 Sec. 18. If:

25 (1) a claim for a lien under this chapter has been filed with the
 26 office of the recorder of the county in which commercial real
 27 estate or any interest in commercial real estate is located; and

28 (2) an escrow account is established among:

29 (A) the one (1) or more parties allegedly responsible for
 30 payment of the fees or commissions on which the lien is
 31 based;

32 (B) the principal broker that filed the lien; and

33 (C) an independent third party as escrowee;

34 from the proceeds of the conveyance, or from any other
 35 source of funds, in an amount that is at least one hundred ten
 36 percent (110%) of the amount of the lien claimed under this
 37 chapter;

38 the lien against the real estate is extinguished and becomes a lien on

1 **the funds contained in the escrow account. The establishment of an**
2 **escrow account described in this section does not constitute cause**
3 **for any party to refuse to close the transaction.**

(Reference is to HB 1763 as introduced.)

and when so amended that said bill do pass.

Representative Burton